Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1996

LADELL HENDERSON, #N-51632,

Petitioner,

v.

GEORGE E. DETELLA, Warden,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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75 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether Henderson's custodial statement was admitted erroneously and in violation of his Fifth and Fourteenth amendment rights because, in light of Henderson's subpar mentality, the custodial statement was not made voluntarily, nor was it made after a voluntary, knowing and intelligent waiver of his Miranda rights.

II. Whether the lower courts erred in failing to address Henderson's argument relating to the denial of due process resulting from an erroneous attempted murder jury instruction.

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PETITION FOR WRIT OF CERTIORARI

Ladell Henderson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 3, 1996 and December 5, 1996, for the compelling reason that the decisions represent a gross miscarriage of justice that erode Henderson's constitutional rights as guaranteed by the Fifth and Fourteenth Amendments.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit that gives rise to this petition is published at 97 F.3d 942. It is reprinted in the Appendix hereto at page A-1. By order filed December 5, 1996, the Seventh Circuit denied Henderson's petition for rehearing. A-20.

JURISDICTION

Henderson was convicted of murder, attempted murder, home invasion and conspiracy following a jury trial in Illinois state court, and was sentenced by the trial court to terms of natural life for murder and thirty years for attempted murder. The Illinois appellate court affirmed the convictions and sentences for murder and attempted murder. *People v. Henderson*, 175 Ill. App. 3d 483, 529 N.E.2d 1051 (1st Dist. 1988), *app. den.* 125 Ill.2d 570 (1989). A-33. The Illinois Supreme Court denied Henderson's

petition for appeal. *People v. Henderson*, 125 Ill.2d 570, 537 N.E.2d 814 (1989).

On November 13, 1991, Henderson filed a petition for habeas corpus relief in the federal district court of the Northern District of Illinois. Jurisdiction in the federal district court was complete and correct pursuant to 28 U.S.C. § 2254 and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. On September 13, 1994, the district court entered an order denying Henderson's petition and dismissed Henderson's case with prejudice. A-28.

Henderson filed a timely appeal to the United States Court of Appeals for the Seventh Circuit, which affirmed the district court's decision in an opinion filed October 3, 1996. A-1. On December 5, 1996 the Seventh Circuit denied Henderson's motion for rehearing. Pursuant to Supreme Court Rule 13(3), this petition has been filed within 90 days of the denial of rehearing. A-20.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War

> or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution, Section One provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The text of 28 U.S.C. § 2254 is appended hereto at A-44-50, both as it existed at the time of the district court's ruling denying Henderson's habeas corpus petition and as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 stat. 1214.

STATEMENT OF THE CASE

Henderson appeals from the denial by the District Court of his petition for a writ of habeas corpus. In the Illinois state court, Henderson was found guilty of murder, attempted murder, home invasion and conspiracy, and was sentenced to natural life for murder and thirty

years for attempted murder. On appeal, Henderson argued, among other things, that the trial court: (1) denied Henderson's constitutional rights under the Fifth and Fourteenth Amendments by denying Henderson's motion to suppress a custodial statement that Henderson made to an Assistant State's Attorney; and (2) deprived Henderson of his due process rights and a fair trial as a result of an erroneous jury instruction on the charge of attempted murder that allowed Henderson to be convicted without requiring a finding of a specific intent to kill.

The Illinois appellate court affirmed the convictions and sentences for murder and attempted murder. *Henderson*, 529 N.E.2d 1051. The court found that Henderson's sub-par mentality did not negate his waiver of *Miranda* or make his statement involuntary. *Henderson*, 529 N.E.2d at 1054. The court also found that the jury instruction on attempted murder was not erroneous. *Henderson*, 529 N.E.2d at 1053-54.

Pursuant to 28 U.S.C. § 2254, on November 13, 1991, Henderson filed a timely petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois, which was denied. The District Court judge found that the state court's finding of the validity of Henderson's *Miranda* waiver presumptively was correct, and that Henderson's statement was voluntary, but did not address the issue of the erroneous attempted murder instruction.

Henderson timely appealed to the United States Court of Appeals for the Seventh Circuit, which affirmed the district court's decision. The Seventh Circuit found that

Henderson's custodial statement was both voluntary and made with a knowing and voluntary waiver of his *Miranda* rights. The court relied on the state court's apparent factual finding that Henderson knew he was speaking with the State when he made the custodial statement. The court declined to address Henderson's erroneous instruction argument because, although the parties raised and briefed it on appeal, it was not specified in Henderson's second amended habeas corpus petition.

REASONS FOR GRANTING THE PETITION

I

HENDERSON'S CUSTODIAL STATEMENT WAS ERRONEOUSLY ADMITTED IN VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS

In his amended petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois, Henderson argued that the trial court erred in denying Henderson's motion to suppress his custodial statement when the circumstances failed to establish that the statement was voluntary and given after a voluntary, knowing and intelligent waiver of his *Miranda* rights. Although Henderson denied in his statement personally shooting the victims, the admission of the statement at trial was crucial because it placed Henderson at the scene of the crimes. In support of this petition, Henderson cited evidence from the state court trial that Henderson has an IQ of 64 and limited reading and comprehension abilities, and that at the time he gave the statement he was led to believe, and indeed believed,

that the Assistant State's Attorney to whom he made his statement was the lawyer he had been told would be provided for him. The State introduced evidence at the trial confirming that Henderson was confused concerning the identity of the Assistant State's Attorney at the time Henderson gave his statement.

The Seventh Circuit properly addressed Henderson's claim using a two-part inquiry: (1) whether Henderson's statement was voluntary as a matter of law; and (2) whether the record fairly supported the determination that Henderson knowingly and voluntarily waived his *Miranda* rights. However, the court erroneously relied exclusively on the state court's factual determination that Henderson waived his *Miranda* rights, without independently analyzing whether Henderson, in fact, could or did voluntarily make the custodial statement to the Assistant State's Attorney.

A finding of a valid *Miranda* waiver does not compel a finding that a confession was voluntary. *Baskin v. Clark*, 956 F.2d 142, 145 (7th Cir. 1992). Henderson's statement was involuntary, and therefore admitted in violation of Henderson's rights under the Due Process clause of the Fourteenth Amendment, because the police led him to believe, and Henderson in fact did believe, that he was speaking to his own attorney rather than to the State. In addition, Henderson's statement was given without a voluntary, intelligent and knowing waiver of Henderson's *Miranda* rights, in violation of Henderson's Fifth, Sixth, and Fourteenth Amendment rights, because Henderson in fact did not know or understand that he was waiving any rights by speaking with a person he believed to be his own attorney.

A. Henderson's Statement Was Not Given Voluntarily

Whether a statement is voluntary is a question of law that is reviewed de novo by the federal appeals court. *Baskin v. Clark*, 956 F.2d 142, 145 (7th Cir. 1992); *Weidner v. Thieret*, 866 F.2d 958, 961 (7th Cir. 1989). Although the reviewing court defers to the state court's findings of historical fact, *Weidner*, 866 F.2d at 961; 28 U.S.C. § 2254(d), whether the subsidiary facts amount to a showing by the State that the statement was made voluntarily is subject to plenary review. *Id.*

A statement is not voluntary within the due process clause of the Fourteenth Amendment when there is some element of police overreaching that is causally related to the confession. *Colorado v. Connelly*, 479 U.S. 157, 164, 107 S. Ct. 515, 520, 93 L. Ed. 2d 473 (1986). An interrogation becomes constitutionally objectionable, and thus coercion occurs, when the person questioned is prevented from making a rational choice. *Weidner*, 866 F.2d at 963. An accused's age, intelligence and education are relevant considerations in determining whether the accused was prevented from making a rational choice. *Id.* at 964.

Misrepresentations can result in coercive police activity. *Id. See also, Leyra v. Denno*, 347 U.S. 556, 74 S. Ct. 716, 98 L. Ed. 948 (1954) (A psychiatrist sent by the police was introduced as a physician present to help the accused, rendering the resulting confession involuntary.) Other factors considered include the accused's age, his education level, his intelligence level, whether the accused was advised of his constitutional rights, the length of his

detention, the nature of the questioning, and the use of force or deprivation. *Weidner*, 866 F.2d at 964.

Police overreaching includes not only physical coercion, but "more subtle form of psychological persuasion." *Colorado v. Connelly*, 479 U.S. at 164. The mental condition of the accused is a significant factor in determining whether a statement was made voluntarily. *Id.* "[I]t takes less in terms of threats or other means of inducing fear to interfere with the deliberate processes of one whose capacity for rational choice is limited." *Smith v. Duckworth*, 910 F.2d 1492, 1496 (7th Cir. 1990).

In the present case, testimony of the State's witnesses established that when Henderson was arrested, Henderson indicated that he understood the *Miranda* rights as explained to him and that he did not wish to give a statement. Indeed, the record demonstrates that until the interview with the Assistant State's Attorney, Henderson denied any involvement with the alleged crimes.

During the four hours that Henderson was held at the police station prior to his interview with the State, Henderson testified that he was told by police that an attorney would be coming to help him. During these hours, police read Henderson his *Miranda* rights, including that if he could not afford an attorney, the state would provide one for him. While Henderson, a public defender client, awaited this state appointed counsel, the Assistant State's Attorney, Kim Kardas, arrived. Henderson testified that shortly before Kardas arrived, a police officer told Henderson that his attorney was there to help him.

The State's version of the events surrounding Henderson's statement, which was accepted by the lower

courts, does not address whether Henderson understood that he was speaking to the State when he made the statement, even if he was capable of understanding who Assistant State's Attorneys were and what their role was. Given Henderson's intelligence, the controlling question should have been whether Henderson did understand, not just whether he was capable of understanding, that he was speaking to the State.

Furthermore, it is undisputed that Henderson gave his statement and Kardas transcribed it. There is no evidence that Henderson was offered the opportunity to write his own statement or that Kardas inquired whether he was able to do so. When attempting to read the statement as written by Kardas, Henderson for the first time realized that he had been speaking with the Assistant State's Attorney. It also is undisputed that Henderson appeared confused when he tried to read the statement. Henderson stated that he thought the Assistant State's Attorney was his attorney and also that the Assistant State's Attorney had said that he was Henderson's attorney.

Moreover, the trial court never made a finding that Henderson was not told by Kardas that Kardas was there as his attorney or that Henderson in fact did not believe that Kardas was his attorney. This finding is required to determine whether Henderson voluntarily made his statement to the State. Because the evidence demonstrates that Henderson was led to believe that Kardas was his attorney, and indeed believed that he was, the statement that Henderson made was involuntary and its introduction at trial deprived Henderson of his constitutional rights under the Fifth and Fourteenth Amendments.

B. Defendant Gave His Statement Without An Intelligent, Knowing, and Voluntary Waiver of his *Miranda* Rights

Federal courts will defer to the state court determination of the validity of *Miranda* waivers, unless that determination is not fairly supported by the record. 28 U.S.C. § 2254; *Baskin v. Clark*, 956 F.2d 142, 145 (7th Cir. 1992). The government must prove by a preponderance of the evidence that a defendant knowingly and intelligently waived his *Miranda* rights. *Lego v. Twomey*, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972).

A waiver is the intentional relinquishment of a known right. *See, Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L.E.2d 378 (1980) Relinquishment of a right involves two dimensions. *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). First, the waiver must have been voluntary and free of coercion. *Id.* In addition, the waiver must be made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*

> Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. The state of mind of the police is irrelevant to the question of an accused's voluntary, knowing and intelligent waiver of *Miranda* rights. *Id.* at 423. However, the state of mind of the accused is crucial.

> There is little doubt that mental illness can interfere with a defendant's ability to make a knowing and intelligent waiver of his *Miranda* rights. Competency to make such a waiver is, of course, to be determined according to the totality of circumstances.

Miller v. Dugger, 838 F.2d 1530, 1539 (11th Cir. 1988), *cert. den.* 486 U.S. 1061 (1988).

Federal courts have held that the subpar mentality of the accused impedes the accused's ability to make a voluntary, knowing and intelligent waiver. In *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972), the court determined that youths who had no experience with the criminal justice system and IQs ranging between 61 and 67 were incapable of making valid waivers. Other factors considered in determining whether an accused is capable include age, mental deficiency, and lack of familiarity with the criminal justice system. *Id.* at 1145; *see also, United States ex rel. Martinez v. Thomas*, 526 F.2d 750, 756 (2d Cir. 1975) (defendant had I.Q. of 63).

In the present case, evidence established that Henderson was 18 at the time of his arrest and that he had an I.Q. of 64, in the mentally deficient range. Henderson was induced to make a statement only after being led to believe that the person questioning him was his own attorney.

Moreover, although the form Kardas used when he drafted Henderson's statement provided standard *Miranda* waiver provisions for Henderson's signature, Kardas never requested that Henderson sign the written waiver provisions. Kardas, who had been in the Felony Review

rotation only two weeks when he interviewed Henderson, instead testified that he did not customarily request written waivers when he was only speaking with a suspect. If Kardas had requested the written waiver, Henderson would have had the opportunity to see that the form was from the Cook County State's Attorney's office.

The trial court merely found that State had borne its burden of showing that Henderson's statement was given after Henderson "understandingly and knowingly waived his Constitutional rights to remain silent." However, the court did not address that Henderson was in fact mentally deficient. In addition, it is uncontested that upon reviewing the statement as written by Kardas, Henderson stated that Kardas had told him that he was Henderson's attorney and that Henderson thought Kardas was his attorney. It also is undisputed that as soon as Henderson discovered that Kardas did not work for him, he refused to sign the statement.

The trial court's finding is not supported by a fair reading of the record because it is impossible for Henderson to knowingly and intelligently waive his rights to counsel and to remain silent when he never believed that he was making a statement to anyone other than his defense counsel. Henderson could not have understood that any statement he made could be used against him at trial.

A fair reading of the record below illustrates that no court made the requisite independent finding that at the time Henderson made his statement to Kardas, Henderson understood that he was making a statement that would be used against him. Moreover, Henderson could

not have waived his right to counsel because he thought he was speaking with his counsel. Henderson's statement was made without a voluntary, knowing, and intelligent waiver of his *Miranda* rights and was erroneously admitted at trial.

II

HENDERSON WAS DENIED DUE PROCESS RIGHTS BY THE ERRONEOUS ATTEMPTED MURDER INSTRUCTION

The Seventh Circuit did not address Henderson's argument that the state court's erroneous jury instruction deprived Henderson of his due process rights because that argument was not raised in Henderson's second amended habeas corpus petition. Although issues not raised in the district court generally are waived on appeal, an appellate court may address issues of law that are briefed fully on appeal, notwithstanding the appellant's failure to raise them below. *Scholes v. Lehman*, 56 F.3d 750, 760 (7th Cir. 1995). Additionally, an issue is not waived in circumstances "where injustice might otherwise result." *Grossart v. Dinaso*, 758 F.2d 1221, 1226 (7th Cir. 1985) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

These standards require consideration of the present issue. The erroneous instruction claim is a purely legal issue; no issues of fact need to be resolved or considered. Additionally, both parties fully briefed this issue to the Seventh Circuit. Henderson raised the erroneous instruction issue in the state appellate court and identified the constitutional nature of this issue in his first amended pro

se petition in the district court. However, Henderson's appointed counsel prepared and filed a second amended petition which failed to include this issue. Henderson was not aware of this omission.

A federal court may overturn a conviction resulting from a state trial in which an erroneous jury instruction was used if it is established that the instruction is erroneous and violated some right which is guaranteed to the defendant by the Fourteenth Amendment. *See, Cupp v. Naughten*, 414 U.S. 141, 146, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973). When reviewing the instruction, the court does not look at the instruction in isolation, but within the context of the overall charge. *Cupp*, 414 U.S at 147. The flawed instruction must have "so infected the entire trial that the result violates due process." *Id.*

Due process requires a state to prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A defective jury instruction can violate this requirement by allowing the state to presume the element of intent. *See, Sandstrom v. Montana*, 442 U.S. 510, 523, 99 S. Ct. 2450, 2458, 61 L. Ed. 2d 39 (1979).

In the present case, the trial court's instruction on attempted murder was erroneous because it allowed the jury to find the defendant guilty of attempted murder without finding that he acted with the specific intent to kill. The jury was instructed regarding the charge of murder as follows:

> A person commits the offense of murder when he kills an individual if, in performing the acts which cause death, he intends to kill or do great

> bodily harm to that individual; or he knows that such acts would cause death to that individual; or he knows that such acts create a strong probability of death or great bodily harm to that individual; or he is committing the offense of home invasion.

The jury was instructed on attempted murder as follows:

> A person commits the offense of attempt when he, with intent to commit the offense of murder, does any act which constitutes a substantial step toward the commission of the offense of murder.
>
> The offense attempted need not have been committed.

The jury further was instructed, in part:

> To sustain the charge of attempt, the State must prove the following propositions: First, that the defendant, or one for whose conduct he is legally responsible, performed an act which constituted a substantial step toward the commission of the offense of murder; and, second, that the offender, or one for whose conduct he is legally responsible, did so with intent to commit the offense of murder. If you find from your consideration of all of the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty . . .

These jury instructions are clearly erroneous pursuant to Illinois law. The Illinois State Supreme Court has held that an instruction must make clear that criminal intent to kill is necessary in order to convict for attempted murder. *People v. Harris*, 72 Ill. 2d 16, 27, 377

N.E.2d 28 (1978); *People v. Trinkle*, 68 Ill. 2d 198, 201, 369 N.E.2d 888 (1977).

In *Harris* and *Trinkle*, the attempted murder instructions stated that a person commits attempted murder when acting with intent to commit murder. *Harris*, 377 N.E.2d at 32-33; *Trinkle*, 369 N.E.2d at 889. However, the decisions held that reference only to the murder instruction allowed the jury to make a finding of guilt based on a *mens rea* less than specific intent to kill. A finding of guilt on the murder instruction could result if the defendant had acted merely with the knowledge that his conduct created a strong probability of bodily harm. *See, Harris*, 377 N.E.2d at 33; *Trinkle*, 369 N.E.2d at 890. "[T]he jury could have found the defendant guilty of attempted murder sans specific intent to kill." *Trinkle*, 369 N.E.2d at 890.

Likewise, the jury instructions in Henderson's case allowed the jury to convict Henderson without the requisite intent to kill because the attempted murder instruction included only the intent to commit murder. The murder instruction allowed for various mental states, rather than the specific, requisite intent to kill. Therefore, the jury could find the defendant guilty of attempted murder without a finding of specific intent to kill.

The evidence before the jury directly conflicted. The state attempted to prove, largely on the basis of the testimony of Mona Chavez, that the defendant committed the crimes directly and personally. Chavez testified that Henderson personally shot her and her uncle, Dennis Leonard. The defense theory was that Henderson did not

pull the trigger but merely was present at the scene prior to the shooting.

Indeed, the record shows that the jury was uncertain as to the defendant's mental state. During deliberations, the jury tendered the following question to the judge:

> Is it possible to reach a verdict of guilty on the charge of murder if the jury is not convinced that Ladell [Henderson] shot Dennis Leonard, is not convinced that Ladell knew beforehand that Dennis would be shot but is convinced that Ladell aided and abetted other persons in the crime of home invasion on the night of the killing?

In response to their question, the judge merely responded, "Read your instructions." The jurors' question demonstrates their confusion on the intent issue. This jurors' question is not surprising given that Henderson's statement, even if admissible, does not support the finding that Henderson personally performed the shooting of Leonard and Chavez. If the jury believed Henderson and rejected Chavez' testimony, it could still have found Henderson guilty of attempted murder pursuant to the erroneous instruction given by the court.

As illustrated by the jurors' explicit question on this issue, the erroneous instruction infected the whole trial by permitting the state to avoid its burden of proving the element of specific intent to kill. The jury's question and Henderson's statement call into question whether the jury would have found Henderson guilty of even the attempted murder charge. That the jury questioned or even rejected Chavez' testimony that Henderson was the shooter, demonstrates that this erroneous instruction

infected the entire deliberation process. The erroneous instruction therefore violated Henderson's Fourteenth Amendment right to due process.

The evidence in the record, the erroneous instruction regarding the requisite state of mind for attempted murder, and the jury's question illustrating the jury's uncertainty about the defendant's mental state, all show that the erroneous instruction on the charge of attempted murder was not harmless beyond a reasonable doubt.

CONCLUSION

Henderson was denied his rights under the Fifth and Fourteenth Amendments when the state trial court denied his motion to suppress the custodial statement Henderson made to the Assistant State's Attorney. Henderson is of a subpar mentality and was young and in custody when the statement was made. Henderson was led to believe, and in fact did believe, that he was speaking with his state appointed counsel and not the State. Henderson's statement therefore was involuntary. Moreover, the totality of circumstances shows that Henderson did not voluntarily, knowingly and intelligently waive his right to counsel or his right to remain silent. Henderson was also denied a fair trial by the erroneous instruction to the jury that allowed Henderson to be convicted on the charge of attempted murder without the required showing by the State that Henderson possessed the specific intent to kill.

WHEREFORE, Petitioner Ladell Henderson respectfully prays that a writ of certiorari issue to review the

judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

LADELL HENDERSON
By His Attorney

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: October 3, 1996

BEFORE: Honorable ILANA DIAMOND ROVNER, Circuit Judge
Honorable DIANE P. WOOD, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

No. 95-1834

LADELL HENDERSON,

Petitioner-Appellant

v.

GEORGE E. DeTELLA,

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 91 C 7288, Brian Barnett Duff, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

(1061-110393)

In the

United States Court of Appeals

For the Seventh Circuit

No. 95-1834

LADELL HENDERSON,

Petitioner-Appellant,

v.

GEORGE E. DETELLA,*

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 7288 – **Brian Barnett Duff**, *Judge.*

ARGUED JANUARY 4, 1996 – DECIDED OCTOBER 3, 1996

Before ROVNER, DIANE P. WOOD, and EVANS, *Circuit Judges.*

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* In his habeas petition, the petitioner has named as respondents George C. Welborn, currently the warden of the maximum security facility at Tamms, Illinois, and James E. Ryan, the Illinois Attorney General. Because the petitioner is presently in custody at the Stateville Correctional Center pursuant to the conviction he challenges in his habeas petition, the proper respondent is George E. DeTella, the warden of that facility. We have made the substitution pursuant to Fed. R. App. P. 43 at the state's suggestion.

ROVNER, *Circuit Judge.* An Illinois jury convicted Ladell Henderson of murder and attempted murder, for which he was sentenced to respective prison terms of life and thirty years. His petition for a writ of habeas corpus contends that his post-arrest confession of involvement in these crimes was made without a voluntary, knowing, and intelligent waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), and that the trial court erred in barring him from presenting evidence that the complaining witness used narcotics. The district court denied Henderson's petition. We affirm.[1]

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[1] After we heard oral arguments in this appeal, the President signed into law what is known as the Anti-terrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214. Among other changes, the statute adds a new provision to 28 U.S.C. § 2254, under which Henderson seeks relief. Section 2254(d) now provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This court held recently that the provisions of section 2254(d) apply to habeas petitions filed prior to enactment of the new statute. *Lindh v. Murphy*, No. 95-3608 (7th Cir. Sept. 12, 1996) (en banc). We need not decide what effect, if any, these provisions have on our review of Henderson's claims. His petition fails

I.

In the early morning hours of February 28, 1984, Mona Chavez was at home in Chicago watching television with her uncle, Dennis Leonard. After nodding off to sleep, Chavez was awakened by a pounding on the front door. Leonard answered and was confronted by Henderson and two other men. Leonard was thrown to the floor. Henderson told both Chavez and Leonard that they were going to die. He pulled out a gun and fired two shots into the back of Leonard's head, killing him. Chavez, who was sixteen years old, knew Henderson (age eighteen), from the neighborhood. He had asked her on several occasions to be "his lady." (She testified that she had declined his offer, although defense witnesses said that the two were involved romantically.) Days before the shooting he had broken into her apartment and stolen several items of clothing. Now, as Chavez pleaded with Henderson to spare her life, he told her that if he could not have her, no one would. He grabbed her hair, put a gun to her ear, and shot her three times.

Miraculously, Chavez survived. She regained consciousness hours after the shooting, crawled from the second floor apartment, stumbled down the stairs, and sought help from a downstairs neighbor, who telephoned the police. Chavez told the officer who arrived on the scene that Henderson had shot her.

Henderson was located at a tavern and taken into custody. (The record does not disclose the fate of his two

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under either the new or the previous versions of the habeas statute.

accomplices.) Officer Clifton Underwood testified that he apprised Henderson of his *Miranda* rights both at the scene of his arrest and later at the police station; he also testified that Henderson acknowledged these rights as he was informed of them. Henderson did not appear confused to the officers who observed him. Although cooperative, he declined to make a statement initially, other than to profess ignorance as to the reason for his arrest and to deny having killed anyone. However, according to Underwood, Henderson later had a change of heart and said that he wanted to tell Underwood "what really happened." Underwood testified that he again told Henderson what his rights were, and that Henderson acknowledged them. The two then spoke for twenty to thirty minutes. Subsequently, Assistant State's Attorney Kim Kardas took a statement from Henderson. Kardas knew Henderson from a previous prosecution in juvenile court and later testified that he reminded Henderson of this as he introduced himself. Detective Peter Valesares was present while Kardas interviewed Henderson and confirmed that Kardas and Henderson appeared to know one another. Valesares also testified that he told Henderson before this interview that he was being charged with shooting Chavez and killing Leonard and that a state's attorney would be coming to speak with him.

After speaking with Henderson, Kardas prepared a written statement for him to sign. In substance, the statement indicated that Henderson had taken two men ("Billy Ray" and "Speedy") to Chavez's home for the purpose of executing a contract on her life (she purportedly had "set up" an El Rukn gang member), but did not participate in the shootings. When Henderson began to

review the statement, he noted a reference to Kardas being an assistant state's attorney. He purported to be confused by that and said that he had understood Kardas to be his own attorney, not the state's. He then refused to sign the statement. Henderson later testified at a suppression hearing that he had spoken to Kardas thinking that Kardas was a defense attorney, not a prosecutor.

The state subsequently charged Henderson with murder, attempted murder, conspiracy to commit murder, and home invasion. Chavez testified at trial and identified Henderson as the assailant. On cross-examination, the defense inquired into her relationship with one Quintin Jones and asked Chavez whether she had used "speed" in the presence of Henderson and Jones. Chavez acknowledged knowing Jones but denied that she had been involved with him romantically and denied having ever used speed. When the defense later attempted to have Jones testify that he had seen Chavez use drugs on numerous occasions, the trial court sustained the state's objection, noting that "the only reason [you're] doing it is to dirty up the witness." In addition to Chavez's testimony, the state was permitted to offer into evidence the written statement that Kardas prepared based on what Henderson had told him. That statement, of course, placed Henderson at the scene of the shooting. Henderson had moved unsuccessfully in advance of trial to suppress the statement. Having failed in that effort, Henderson's theory of defense was that although he had participated in the home invasion, he had done nothing more. The jury rejected that theory and convicted Henderson on all charges. The trial judge ordered Henderson to serve a term of natural life in prison for Leonard's

murder, thirty years for the attempted murder of Chavez, and seven years for the conspiracy to commit murder. No sentence was imposed for the home invasion.

On appeal, the Illinois appellate court vacated Henderson's conviction on the conspiracy charge, but affirmed his conviction and sentence on the other charges. *People v. Henderson,* 529 N.E.2d 1051 (Ill. App. 1988), *leave to appeal denied,* 537 N.E.2d 814 (Ill. 1989). Among other issues, the court disposed of two that Henderson has pursued in his habeas petition: the admission of his post-arrest statement to the authorities and the refusal to permit him to present extrinsic evidence of Chavez's past drug use. Henderson had moved to suppress his statement arguing that for two reasons his decision to waive his *Miranda* rights was not voluntary, knowing, and intelligent. He contended that he had been misled into thinking that Kardas was his own attorney and that, in any event, his limited mental capacity and below-average I.Q. (sixty-four) rendered him unable to make a reasoned decision in this regard. The appellate court did not specifically address the purported confusion as to Kardas' affiliation, although in its recitation of the trial testimony the court noted that Kardas claimed to have expressly identified himself as the state's attorney, not Henderson's. The court did address the question of Henderson's mental capacity to waive his *Miranda* rights:

> In reviewing the totality of circumstances surrounding defendant's statement, we find that a preponderance of the evidence demonstrates that the defendant understood and knowingly waived his constitutional rights. Where as here the record supports a finding that defendant's

> subpar mentality did not interfere with his ability to comprehend the meaning of a voluntarily made statement or a right to counsel, his statement will not be suppressed.

529 N.E.2d at 1054. The court also found no error in the trial court's decision to exclude Jones from testifying as to Chavez's purported drug use.

> Defendant made no reference or qualification as to when the victim allegedly used drugs or the extent of impairment from the use of any drugs. Thus, we are inclined to agree with the trial court that such evidence would not shed light on the victim's ability to adequately perceive the events as they occurred on the night of the offense. To the contrary, this evidence would simply "dirty up" the witness in the eyes of the jury. Accordingly, we find that the trial court properly excluded any evidence of the victim's alleged drug addiction.

Id.

Henderson renewed these arguments in his habeas petition. His first amended petition (which, like the original, was prepared pro se) also asserted a third claim that the jury had been erroneously instructed on attempted murder. After the district court appointed counsel for Henderson, however, that petition was withdrawn and a second amended petition was filed which omitted this claim. The district court rejected the other two claims on their merits. It noted that "[s]tate-court determinations of the validity of *Miranda* waivers are presumed correct under § 2254(d)," and that in this case the finding of a knowing waiver was supported by the testimony of Assistant State's Attorney Kardas. *United States ex rel.*

Henderson v. Welborn, No. 91 C 7288, Mem. Op. at 3 (N.D.Ill. Sept. 13, 1994). The court observed further that Henderson's claim that he was not mentally equipped to waive his rights was "belied by the fact that he attempted to refute the validity of this *Miranda* waiver after *reading* his statement." *Id.* (emphasis in original). Under the totality of the circumstances, then, the court found that Henderson had waived his rights and had voluntarily made the post-arrest statement admitted at trial. *Id.* The court also rejected Henderson's claim that the exclusion of testimony concerning Chavez's purported drug use violated the Confrontation Clause of the Sixth Amendment. *Id.* at 2. The court noted that Henderson had been permitted to cross-examine Chavez on the subject of drug use, and he was not precluded from impeaching Chavez in *any* manner, but only through Jones. *Id.*

II.

Henderson pursues these same two issues on appeal. His *Miranda* waiver cannot be deemed voluntary, knowing, and intelligent, he insists, in light of evidence that he was led to believe that he was talking to his own attorney rather than the prosecutor when he waived his right to remain silent, and in light of evidence that his intellectual capabilities are limited. He also renews his argument that he was deprived of his Sixth Amendment right to confront Chavez when the court precluded extrinsic testimony concerning her purported drug use. Henderson attempts additionally to raise a third issue: he contends that he was deprived of due process by an instruction on the attempted murder charge that (purportedly) permitted the jury to convict him on that charge without finding

that he acted with the specific intent to kill Chavez. This issue was, as we have noted, omitted from the second amended petition prepared by Henderson's counsel and presented to the district court for decision; the first amended pro se petition, which did raise this issue, was withdrawn. As it was not before the district court, the jury instruction issue is beyond our review in this appeal, and we do not address it. *Williams v. Turner*, 5 F.3d 1114, 1116 (7th Cir. 1993); *D.S.A. v. Circuit Court Branch 1*, 942 F.2d 1143, 1152 n. 17 (7th Cir. 1991), *cert. denied*, 502 U.S. 1104, 112 S.Ct. 1196 (1992).

A. Waiver of *Miranda* Rights

When a *Miranda* waiver is challenged, two distinct questions are presented: whether the waiver was voluntary, knowing, and intelligent as a matter of fact, and whether it was involuntary as a matter of law. *Baskin v. Clark*, 956 F.2d 142, 145 (7th Cir.), *cert. denied sub nom. Baskin v. Farley*, 506 U.S. 835, 113 S.Ct. 109 (1992), and *cert. denied sub nom. Farley v. Baskin*, 506 U.S. 904, 113 S.Ct. 296 (1992). Whether a petitioner actually waived his *Miranda* rights, and whether he did so freely, knowingly, and intelligently, are fact-dependent issues that the state courts are best situated to resolve. *Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217, 219 (7th Cir.), *cert. denied*, 484 U.S. 867, 108 S.Ct. 190 (1987); *Perri v. Director, Dep't of Corrections*, 817 F.2d 448, 451 (7th Cir.), *cert. denied*, 484 U.S. 843, 108 S.Ct. 135 (1987). Frequently, for example, the state and the petitioner offer conflicting testimony as to whether the petitioner was apprised of and willingly relinquished his rights; assessing the *Miranda* waiver thus demands credibility assessments that

typically only the trier of fact can make. *Bryan*, 820 F.2d at 219; *see also Weidner v. Thieret*, 866 F.2d 958, 961 (7th Cir. 1989), *cert. denied*, 502 U.S. 1036, 112 S.Ct. 883 (1992). The state court's historical findings as to the petitioner's knowledge, understanding, and determination to forgo his *Miranda* rights are, consequently, entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1) (1996), formerly § 2254(d) (*see* n.1, *supra*). *E.g.*, *Jones v. Page*, 76 F.3d 831, 852 (7th Cir. 1996), *petition for cert. filed* (U.S. June 28, 1996) (No. 96-5064); *Bryan*, 820 F.2d at 219-20 (collecting cases). Yet:

> Whether a defendant made a voluntary, knowing and intelligent waiver of his *Miranda* rights is distinct from the issue of whether, under the totality of the circumstances, the challenged statement was involuntary. *Bryan*, 820 F.2d at 219. A court may find that a defendant made a valid waiver and yet still hold that a confession was involuntary.

Baskin, 956 F.2d at 145. The ultimate question whether a petitioner's statement was involuntary, and thus whether it was properly admitted at trial, is one of law. *Bryan*, 820 F.2d at 219, 220; *see also Baskin*, 956 F.2d at 145. The Supreme Court has explained why:

> Although sometimes framed as an issue of "psychological fact," *Culombe v. Connecticut*, 367 U.S. [568], at 603, 81 S.Ct. [1860], at 1879 [(1961)], the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension. It is telling that in confession cases coming from the States, this Court has consistently looked to the Due Process Clause of the Fourteenth Amendment to test admissibility. See, *e.g.*, *Mincey v. Arizona*, 437 U.S. [385], at 402,

> 98 S.Ct. [2408], at 2418 [(1978)]. The locus of the right is significant because it reflects the Court's consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne. See, *e.g.*, *Gallegos v. Colorado*, 370 U.S. 49, 51, 82 S.Ct. 1209, 1211, 8 L.Ed.2d 325 (1962) (suggesting that "a compound of two influences" requires that some confessions be condemned); *Culombe v. Connecticut*, *supra*, 367 U.S., at 605, 81 S.Ct., at 1880 (describing voluntariness as an "amphibian"). This hybrid quality of the voluntariness inquiry, subsuming, as it does, a "complex of values," *Blackburn v. Alabama*, 361 U.S. [199], at 207, 80 S.Ct. [274], at 280 [(1960)], itself militates against treating the question as one of simple historical fact.

Miller v. Fenton, 474 U.S. 104, 115-16, 106 S.Ct. 445, 452-53 (1985) (footnote omitted) (emphasis in original). Thus, whether the petitioner's statement was the product of fundamentally fair procedures, untainted by any type of coercion, is a legal question that we review de novo. *Weidner*, 866 F.2d at 961; *Bryan*, 820 F.2d at 219, 220; *see also United States v. Betts*, 16 F.3d 748, 763 n.10 (7th Cir. 1994).

1. Involuntariness

We take up the legal question first. As we have explained, Henderson argues that his statement was involuntary as a matter of law because the authorities

deceived him into thinking that Kardas was his own counsel. *See, e.g., Leyra v. Denno*, 347 U.S. 556, 74 S.Ct. 716 (1954) (confession to state-employed psychiatrist deemed involuntary where defendant misled as to psychiatrist's mission and allegiance). The admission of that statement at trial was therefore assertedly in violation of the Due Process Clause of the Fourteenth Amendment. As a legal assertion, this claim demands plenary review. But the assertion depends on a point of fact as to which the parties disagree: did Kardas identify himself to Henderson as a prosecutor? On that subsidiary factual question, we defer to the state court. *Weidner*, 866 F.2d at 961; *Bryan*, 820 F.2d at 221.

Henderson initially contends that neither the state trial and appellate courts nor the district court have ever addressed this claim. It is true that none of the courts to whom Henderson has made this argument previously has rejected it expressly. Yet, each court did find ultimately that Henderson's waiver was made voluntarily, knowingly, and intelligently (S.R. 35 (trial court), 529 N.E.2d at 1054 (appellate court), Mem. Op. at 3 (district court)), and there is no requirement that a court detail its reasons for rejecting each of the arguments the petitioner has advanced for a contrary finding. *See, e.g., Baskin*, 956 F.2d at 144; *Weidner*, 866 F.2d at 963; *Bryan*, 820 F.2d at 221. Moreover, it seems clear to us is [sic] that each of the courts did have in mind Henderson's allegation as to Kardas' identity. For example, the Illinois appellate court, in its factual summary of the case, noted:

> Kardas testified that prior to his questions directed to defendant, he informed defendant that he was an assistant State's Attorney. Kardas

> read defendant his rights and defendant indicated that he understood. According to Kardas, defendant stated that he knew what an assistant State's Attorney was and also knew that Kardas was not his lawyer.

People v. Henderson, 529 N.E.2d at 1052. That court plainly understood why this testimony was relevant. Although the court did not go on to find expressly that Henderson was not misled as to whom Kardas represented, we believe that finding was implicit in its conclusion that "the defendant understood and knowingly waived his constitutional rights" and that his limited mental abilities "did not interfere with his ability to comprehend the meaning of a voluntarily made statement or a right to counsel. . . . " *Id.* at 1054.[2] Likewise, when the district court remarked that the state courts' finding of a voluntary waiver "is supported by the statements of the Assistant State's Attorney," we understand it to have meant that Kardas' testimony lent adequate support to the notion that Henderson was properly apprised as to whom Kardas owed his allegiance.

We treat the state courts' implicit determination that Henderson knew who Kardas was as presumptively correct (*Bryan*, 820 F.2d at 221), and having thoroughly reviewed the record, we have found nothing that would

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[2] Neither party, certainly, suggests that this is a case in which the court might have accepted the factual premise of the petitioner's argument, yet still rejected the claim that a constitutional violation occurred. *Cf. Weidner*, 866 F.2d at 962-64 (possibility that state court might have accepted some of petitioner's factual assertions required clarification of court's findings).

permit us to set aside that determination. Kardas and Detective Valesares asserted that Kardas was introduced to Henderson as an assistant state's attorney and that the two knew one another already. The officers who had observed Henderson and spoken with him that day indicated that he seemed to comprehend what was happening. The state's forensic psychiatrist testified that in his interview of Henderson, Henderson had manifested an appreciation of the difference between an assistant state's attorney and a defense attorney. *See United States v. Frank*, 956 F.2d 872, 878 (9th Cir.), *cert. denied*, 506 U.S. 932, 113 S.Ct. 363 (1992). By the state's account, not until Henderson began to read the written statement Kardas had prepared did he show signs of confusion. Whether that confusion was genuine, and whether Henderson had been misled as to whom Kardas represented, turned entirely on the credibility of the witnesses who testified before the state trial court. The state court plainly credited the state's witnesses, and we have no basis to disturb that credibility determination. *Sprosty v. Buchler*, 79 F.3d 635, 645 (7th Cir. 1996), *petition for cert. filed* (U.S. June 21, 1996) (No. 95-9393); *Armstrong v. Young*, 34 F.3d 421, 427 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1369 (1995).

Wrested of its factual premise – that Henderson was deceived as to whom Kardas represented – the legal claim of involuntariness necessarily fails. Looking to the totality of the circumstances, we see no hint of coercion or otherwise unfair behavior on the part of the state that would justify a determination that Henderson's statement to Kardas was involuntary and that the admission of the statement at trial was necessarily erroneous. This leaves Henderson with the claim that he did not, as a matter of

fact, waive his *Miranda* rights. That claim we take up next.

2. Waiver as a matter of fact

Based on the evidence of record, we also find no reason to disturb the state courts' determination that Henderson made a voluntary, knowing, and intelligent decision to waive his *Miranda* rights notwithstanding the apparent limits of his intellect. Again, this was a factual determination that we treat as presumptively correct. *See Jones*, 76 F.3d at 852; *Perri*, 817 F.2d at 451-52; *Bryan*, 820 F.2d at 219. Henderson's purportedly low I.Q. and limited reading and comprehension capabilities obviously call for caution in assessing the uncounseled waiver of his constitutional rights. *See Sims v. Georgia*, 389 U.S. 404, 407, 88 S.Ct. 523, 525 (1967) (per curiam); *Miller v. Dugger*, 838 F.2d 1530, 1539 (11th Cir.), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2832 (1988); *Moore v. Ballone*, 658 F.2d 218, 229-30 (4th Cir. 1981); *Cooper v. Griffin*, 455 F.2d 1142, 1145-46 (5th Cir. 1972). Yet, as both the Illinois appellate court and the district court recognized, such limitations, at least of the degree presented here, do not preclude a finding that Henderson could and in fact did make a reasoned and independent decision to speak with the authorities. *See Toste v. Lopes*, 861 F.2d 782, 783 (2d Cir. 1988) (per curiam), *cert. denied sub nom. Toste v. Meachum*, 490 U.S. 1112, 109 S.Ct. 3170 (1989); *Winfrey v. Wyrick*, 836 F.2d 406, 411 (8th Cir. 1987), *cert. denied sub nom. Winfrey v. Armontrout*, 488 U.S. 833, 109 S.Ct. 91 (1988); *United States v. Glover*, 596 F.2d 857, 866 (9th Cir.), *cert. denied*, 444 U.S. 860, 100 S.Ct. 124 (1979), and *cert. denied sub nom. Morrow v. United States*, 444 U.S. 857, 100 S.Ct. 117 (1979); *see also United*

States v. Bad Hand, 926 F.Supp. 891, 899-900 (D.S.D. 1996) (collecting cases). Here, in addition to the testimony of a psychologist who documented Henderson's below-average I.Q. and limited reading abilities, the state court had other evidence suggesting that Henderson was able to comprehend what his rights were and to waive them knowingly and voluntarily. The state's forensic psychiatrist had deemed him fit for trial, finding, among other things, that Henderson was able to appreciate the nature of the charges against him. The police officers who observed Henderson on the day of his arrest described him as cooperative and understanding of what was transpiring. According to those officers, Henderson had acknowledged his rights on each of the several occasions that they were explained to him. Henderson himself testified at the suppression hearing that he had been read his rights, that he had heard them many times before, and that he had told the police that he understood them. Indeed, he declined to make a statement on the first two of these occasions, and later began to speak, according to Officer Underwood, of his own accord and at his own initiative. He then gave a statement to Kardas, according to the state's witnesses, knowing full well who Kardas was. This was not, finally, Henderson's first encounter with the authorities. At age eighteen, Henderson already had a significant criminal record and in fact had, by the state's account, already encountered Kardas in the context of a juvenile prosecution. Under all of these circumstances, we must accept the state courts' determination that Henderson was able to make a valid decision to forego his *Miranda* rights and speak with the police and with Kardas and that he in fact did so.

B. Impeachment of Chavez

Chavez's testimony was crucial to the state's case against Henderson. The use of narcotics can, obviously, affect the ability of a witness to perceive, to recall, and to recount the events she has observed. Whether Chavez may have been under the influence of narcotics at the time of the offense (or at some other pertinent time) was thus an appropriate subject of inquiry and impeachment. *United States v. Cameron*, 814 F.2d 403, 405 (7th Cir. 1987).

But we agree that Henderson was not deprived of his right to confront the witnesses against him when the trial court barred the testimony of Quintin Jones.[3] Had the proffer of Jones' testimony established that Chavez was using narcotics within the time frame of the events to which she testified, it might have been improper and prejudicial to Henderson to exclude the testimony. Instead, however, Jones was held up as a witness who would testify simply that he had known Chavez to use drugs on many occasions; we do not know when those occasions were in reference to the murder of Leonard and the attempted murder of Chavez. It is thus not at all clear that the testimony was probative of Chavez's ability to recognize and identify the individual who committed the

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[3] The district court suggested that despite the fact that Jones was not permitted to testify, Henderson himself could have taken the stand to impeach Chavez on the subject of her alleged drug use. Assuming that Henderson could have given such testimony as a factual matter, we agree with Henderson that this is irrelevant to the propriety of the trial court's decision to exclude Jones' testimony on this subject. Henderson, of course, enjoyed a Fifth Amendment right not to take the stand, which he exercised.

offense. *See United States v. Robinson*, 956 F.2d 1388, 1398 (7th Cir.), *cert. denied*, 506 U.S. 1020, 113 S.Ct. 654 (1992) (testimony as to witness' drug use properly excluded where voir dire did not establish that it affected the witness' memory of relevant events). Absent a connection to Chavez's cognitive abilities, Jones' testimony would have served only to impeach her character, a purpose we have repeatedly deemed improper. *See United States v. Neely*, 980 F.2d 1074, 1081 (7th Cir. 1992); *Robinson*, 956 F.2d at 1397-98; *Cameron*, 814 F.2d at 406. Under these circumstances, we see no error, and certainly none rising to the level of a constitutional deprivation, in the decision to bar Jones from testifying on this topic. *Robinson*, 956 F.2d at 1398; *Cameron*, 814 F.2d at 406.

III.

The record establishes no error in the state courts' conclusion that Henderson voluntarily, knowingly, and intelligently waived his *Miranda* rights and that the testimony of Quintin Jones concerning Mona Chavez's purported drug use was properly excluded. The district court's decision to deny Henderson's petition for a writ of habeas corpus was therefore correct.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December 5, 1996.

Before

Honorable ILANA DIAMOND ROVNER, Circuit Judge

Honorable DIANE P. WOOD, Circuit Judge

Honorable TERENCE T. EVANS, Circuit Judge

Nos. 95-1834

LADELL HENDERSON, *Petitioner-Appellant,* v. GEORGE E. DeTELLA *Defendant-Appellee,*	))))))))	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 91 C 7288 Brian Barnett Duff, Judge.

ORDER

On consideration of the petition for rehearing filed by petitioner-appellant on November 25, 1996, all of the judges on the panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

October 23, 1996

Before

Hon. ILANA DIAMOND ROVNER,
Circuit Judge

LADELL HENDERSON,	]	Appeal from the United
Petitioner-Appellant,	]	States District Court for the
	]	Northern District of
No. 95-1834 v.	]	Illinois, Eastern Division.
GEORGE E. DETELLA,	]	No. 91 C 7288
Respondent-Appellee.	]	Brian Barnett Duff, Judge.

Upon consideration of: "MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING" filed on October 17, 1996, by counsel for the petitioner-appellant,

IT IS ORDERED that the motion is **GRANTED** and the Petition for Rehearing of the appellant is due November 25, 1996.

Minute Order Form (rev. 12/90)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge	Brian Barnett Duff	Sitting Judge if Other Than Assigned Judge	
Case Number	91 cv 7288	Date	April 4, 1995
Case Title	Henderson v. Welborn		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.]

Sent for Microfilming

APR 4 1995

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "MOTION" box above]

(2) ☐ Brief in support of motion due _____

(3) ☐ Answer brief to motion due _____ Reply to answer brief due _____

(4) ☐ Ruling/Hearing on _____ set for _____ at _____

(5) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ re-set for _____ at _____

(6) ☐ Pretrial conf. ☐ held ☐ continued to ☐ set for ☐ re-set for _____ at _____

(7) ☐ Trial ☐ Set for ☐ re-set for _____ at _____

(8) ☐ Bench Trial ☐ Jury Trial ☐ Hearing held and continued to _____ at _____

(9) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to
☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)

(10) ☐ [Other docket entry]

Enter amended order of January 10, 1995. This court denies the petition for a certificate of probable cause pursuant to Fed.R.App.P. 22(b).

(11) ☑ [For further detail see ☑ order on the reverse of ☐ order attached to the original minute order form.]

	No notices required, advised in open court.		number of notices
	No notices required.		
	Notices mailed by judge's staff.	APR - 4 1995	date docketed
	Notified counsel by telephone.		docketing dpty. initials
☑	Docketing to mail notices.		
	Mail AO 450 form.	APR - 4 1995	date mailed notice
	Copy to judge/magistrate Judge.		
	courtroom deputy's initials	Date/time received in central Clerk's Office	

Document

A-22

BEST AVAILABLE COPY

(Reserved for use by the Court)

ORDER

The order of January 10, 1995 is amended to read as follows: the petitioner comes before this court requesting a certificate of probable cause pursuant to Fed.R.App.P. 22(b) to appeal this court's denial of his state habeas petition. The Circuit Court of Cook County convicted the petitioner of murder, attempted murder of a second individual, home invasion and conspiracy to commit murder. The state court sentenced him to natural life imprisonment, thirty years for attempted murder and seven years for conspiracy to commit murder. The petitioner appealed his conviction in state courts and filed a habeas petition before this court. The petitioner raised two grounds in his habeas petition before this court: (1) Sixth Amendment right to confront his accuser was violated when the state court prevented him from introducing a witness to impeach the surviving victim of the shooting and (2) Fifth and Fourteenth Amendment rights were violated when the state court refused to suppress petitioner's confession given to an Assistant State's Attorney. In September 1994, this court denied the petition for the reasons set forth in the opinion.

To prevent frivolous appeals from delaying the ability of state courts to impose sentences, Congress established the requirement that a prisoner obtain a certificate of probable cause to appeal. *Barefoot v. Estelle*, 463 U.S. 880, 892 (1983), *reh'g denied*, 464 U.S. 874 (1983). A certificate of probable cause requires a petitioner to make a "substantial showing of the denial of [a] federal right." *Id.* at 893 (*quoting Stewart v. Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972). A petitioner may demonstrate this by showing that the issues are debatable among jurists of reason, that a court could resolve the issues in a different way or that the questions are adequate to deserve further proceedings. *Lozada v. Deeds*, 498 U.S. 430, 432 (1991).

After reviewing the facts, this court is convinced that the petitioner's current claims concerning the Fifth, Sixth, and Fourteenth Amendments do not warrant the issuance of a certificate of probable cause for appeal. We believe that the state trial court, appellate courts and this court adequately treated these and other issues, including the petitioner's fitness to stand trial. We feel that the petitioner's claims fail to meet the *Lozada* standard and to show that he was denied rights guaranteed by the Constitution, laws or treaties of the United States. For this reason, we deny the petition for a certificate of probable cause pursuant to Fed.R.App.P. 22(b).

/s/ Brian Barnett Duff

Minute Order Form (rev. 12/90)

UNITED STATES DISTRICT COURT, NORTHERN DISTR. OF ILLINOIS

Name of Assigned Judge or Magistrate Judge	Brian Barnett Duff	Sitting Judge if Other Than Assigned Judge	
Case Number	91 cv 7288	Date	January 10, 1995
Case Title	Henderson v. Welborn		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.]

Sent for Microfilming

JAN 11 1995

Entered on JAN 12 1995

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "MOTION" box above]

(2) ☐ Brief in support of motion due _____

(3) ☐ Answer brief to motion due _____ Reply to answer brief due _____

(4) ☐ Ruling / ☐ Hearing on _____ set for _____ at _____

(5) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ re-set for _____ at _____

(6) ☐ Pretrial conf. ☐ held ☐ continued to ☐ set for ☐ re-set for _____ at _____

(7) ☐ Trial ☐ Set for ☐ re-set for _____ at _____

(8) ☐ Bench Trial ☐ Jury Trial ☐ Hearing held and continued to _____ at _____

(9) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to ☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)

(10) ☐ [Other docket entry]

This court denies the petition for a certificate of probable cause pursuant to Fed.R.App.P. 22(b).

(11) ☑ [For further detail see ☒ order on the reverse of ☐ order attached to the original minute order form.]

☐ No notices required, advised in open court		number of notices
☐ No notices required.		
☐ Notices mailed by judge's staff.		date docketed: JAN 11 1995
☐ Notified counsel by telephone.		
☐ Docketing to mail notices.		docketing dpty. initials
☐ Mail AO 450 form.		date mailed notice: JAN 11 1995
☐ Copy to judge/magistrate Judge.		
courtroom deputy's initials	Date/time received in central Clerk's Office	mailing dpty. initials

Document # 24

A-25

BEST AVAILABLE COPY

(Reserved for use by the Court)

ORDER

The petitioner comes before this court requesting a certificate of probable cause pursuant to Fed.R.App.P. 22(b) to appeal this court's denial of his state habeas petition. The Circuit Court of Cook County convicted the petitioner of murder, attempted murder of a second individual, home invasion and conspiracy to commit murder. The state court sentenced him to natural life imprisonment, thirty years for attempted murder and seven years for conspiracy to commit murder. The petitioner appealed his conviction in state courts and filed a habeas petition before this court. The petitioner raised two grounds in his habeas petition before this court: (1) Sixth Amendment right to confront his accuser was violated when the state court prevented him from introducing a witness to impeach the surviving victim of the shooting and (2) Fifth and Fourteenth Amendment rights were violated when the state court refused to suppress petitioner's confession given to an Assistant State's Attorney. In September 1994, this court denied the petition for the reasons set forth in the opinion.

To prevent frivolous appeals from delaying the ability of state courts to impose sentences, Congress established the requirement that a prisoner obtain a certificate

of probable cause to appeal. *Barefoot v. Estelle*, 463 U.S. 880, 892 (1983), *reh'g denied*, 464 U.S. 874 (1983). A certificate of probable cause requires a petitioner to make a "substantial showing of the denial of [a] federal right." *Id.* at 893 (*quoting Stewart v. Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972). A petitioner may demonstrate this by showing that the issues are debatable among jurists of reason, that a court could resolve the issues in a different way or that the questions are adequate to deserve further proceedings. *Lozada v. Deeds*, 498 U.S. 430, 432 (1991).

After reviewing the facts, this court is convinced that the petitioner's current claims concerning the Fifth, Sixth, and Fourteenth Amendments do not warrant the issuance of a certificate of probable cause for appeal. We believe that the state trial court, appellate courts and this court adequately treated these and other issues, including the petitioner's fitness to stand trial. We feel that the record before us presents no constitutional issue. For this reason, we deny the petition for a certificate of probable cause pursuant to Fed.R.App.P. 22(b).

/s/ Brian Barnett Duff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

Henderson, Ladell

v.

George Welbourne

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 91 c 7288

DOCKETED SEP 20 1994

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Because petitioner has not shown that he was denied rights guaranteed by the Constitution, laws or treaties of the United States, we deny his petition and dismiss this case with prejudice.

September 13, 1994
Date

H. STUART CUNNINGHAM
Clerk

/s/ Alicia Castillo
(By) Deputy Clerk

95-1834

Minute Order Form (rev. 12/90)

Sent for Microfilming SEP 20 1994

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge	Brian Barnett Duff	Sitting Judge if Other Than Assigned Judge	
Case Number	91-C-7288	Date	September 13, 1994
Case Title	Henderson v. Welborn		

Eliminate on

A-29

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

SEP 21 1994.

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "MOTION" box above]

(2) ☐ Brief in support of motion due _____

(3) ☐ Answer brief to motion due _____ Reply to answer brief due _____

(4) ☐ Ruling / ☐ Hearing on _____ set for _____ at _____

(5) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ re-set for _____ at _____

(6) ☐ Pretrial conf ☐ held ☐ continued to ☐ set for ☐ re set for _____ at _____

(7) ☐ Trial ☐ Set for ☐ re set for _____ at _____

(8) ☐ Bench Trial ☐ Jury Trial ☐ Hearing held and continued to _____ at _____

(9) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to ☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)

(10) ☐ [Other docket entry]

For the reasons stated below, we deny Henderson's petition for § 2254 relief and dismiss this case, with prejudice.

(11) ☐ [For further detail see ☐ order on the reverse of ☐ order attached to the original minute order form.]

	No notices required, advised in open court	5	number of notices
	No notices required.		
	Notices mailed by judge's staff.	SEP 20 1994	date docketed
	Notified counsel by telephone		
	Docketing to mail notices		docketing dply initials
	Mail AO 450 form.		date mailed notice
	Copy to judge/magistrate Judge		
	courtroom deputy's initials	Date time received in central Clerk's Office	mailing deputy initials

Document # 49

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES ex rel. LADELL HENDERSON,	)	
Petitioner,	)	No. 91-C-7288
vs.	)	
GEORGE WELBORN, Warden,	)	
Respondent.	)	

MEMORANDUM OPINION

Ladell Henderson brings this petition for 28 U.S.C. § 2254 relief on two grounds: (1) his Sixth Amendment right to confront his accuser was violated when the state court refused to allow him to introduce a witness who may have impeached the government's primary witness; (2) his Fifth and Fourteenth Amendment rights were violated when the state court refused to supress [sic] a statement given by petitioner to an Assistant State's Attorney. The statement was allegedly inadmissible because Mr. Henderson did not waive his *Miranda* rights and because his confession was not voluntary.[1]

"Federal habeas actions do not lie for mere errors of state laws." *Stephens v. Miller*, 13 F.3d 998, 1001 (7th Cir.

---

[1] We asked counsel for the petitioner to submit briefs on the question of whether Mr. Henderson was fit to stand trial, because of his alleged deficient mental capacity. Counsel for the petitioner has assured us that the state court adequately considered this issue and decided that Mr. Henderson was indeed fit to stand trial.

1994) en banc. Our inquiry is therefore limited to whether Henderson was denied his rights under the "Constitution, laws or treaties of the United States." *Id.*

"Because the admissibility of evidence in state court proceedings generally is a matter of state law, state court evidentiary rulings rarely will serve as grounds for granting a writ of habeas corpus." *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993) *cert. den.* 114 S.Ct. 154 (1993). Error in the exclusion of evidence reaches constitutional magnitude if the excluded evidence creates a reasonable doubt that otherwise did not exist. *Id.*

Here, the trial court's decision to exclude the impeachment testimony of Quentin Jones neither creates a reasonable doubt a [sic] to Henderson's guilt nor constitutes a violation of the Sixth Amendment's confrontation clause. First, there was ample evidence in the record of Henderson's guilt. Second, the state court did not prohibit Henderson from impeaching the government's witness' alleged use of drugs and her relationships with the other perpetrators. Indeed, counsel for Henderson questioned the witness about her drug use, and could have impeached her through Henderson's testimony, since the government's witness allegedly used drugs in his presence. The trial court did not preclude the petitioner from attempting to impeach the witness, only from attempting to impeach her through Jones' testimony. Jones' testimony was not exculpatory, and, looking at the record as a whole, we find that Henderson was not deprived of "a meaningful opportunity to elicit available, relevant information that was likely to effectively impeach the credibility of the witness." *U.S. v. Cameron*, 814 F.2d 403, 406 (7th Cir. 1987).

Petitioner's argument that his post-arrest statement was unconstitutionally admitted because he did not waive his *Miranda* rights is likewise without merit. Both the trial and appellate courts found that Henderson knowingly waived his *Miranda* rights. *People v. Henderson*, 175 Ill. App. 3d 483, 489 (1st Dist. 1988). State-court determinations of the validity of *Miranda* waivers are presumed correct under § 2254(d). *Baskin v. Clark*, 956 F.2d 142 (7th Cir. 1992), *cert. den.* 113 S.Ct. 109 (1992). Here, the state-court determination is supported by the statements of the Assistant State's Attorney.

Further, Henderson's claims of involuntariness because of mental deficiency is belied by the fact that he attempted to refute the validity of his *Miranda* waiver after *reading* his statement. Under the totality of the circumstances presented in the record, we find that Henderson waived his *Miranda* rights, and that he voluntarily made the disputed statement. *See e.g., United States v. Carter*, 910 F.2d 1524, 1529 (7th Cir. 1990), *cert. den.* 499 U.S. 978 (1991).

Because petitioner has not shown that he was denied rights guaranteed by the Constitution, laws or treaties of the United States, we deny his petition and dismiss this case, with prejudice.

ENTER:

/s/ Brian Barnett Duff
BRIAN BARNETT DUFF,
JUDGE
UNITED STATES
DISTRICT COURT

DATE: September 13, 1994

175 Ill.App.3d 483
124 Ill.Dec. 934

**PEOPLE of the State of Illinois,
Plaintiff-Appellee,**

v.

**Ladell HENDERSON,
Defendant-Appellant.**

No. 85-1290.

Appellate Court of Illinois,
First District, Third Division.

Sept. 28, 1988.

Rehearing Denied Oct. 24, 1988.

Defendant was convicted in the Circuit Court, Cook County, Earl Strayhorn, J., of murder, attempted murder, home invasion, and conspiracy to commit murder, and he appealed. The Appellate Court, Rizzi, J., held that: (1) instruction did not allow jury to find defendant guilty of attempted murder without finding that he had specific intent to kill; (2) evidence of alleged drug use of complaining witness could be excluded; (3) evidence of defendant's impaired intellectual capabilities and his below average I.Q. did not establish that defendant's statement was not made voluntarily and that he did not knowingly waive his right to counsel; (4) testimony of victim and police officer as to victim's prior identification of defendant was admissible to corroborate in-court identification; (5) sentence to term of natural life imprisonment for murder conviction was not abuse of discretion; and (6) defendant could not be convicted and sentenced on both murder and conspiracy to commit murder charges.

Affirmed in part; reversed in part.

Steven Clark, Chicago (Cheryl M. Berdelle, of counsel), for defendant-appellant.

Richard M. Daley, Chicago (Thomas V. Gainer, Jr., Christopher J. Cummings, Michael J. O'Brien, of counsel), for plaintiff-appellee.

Justice RIZZI delivered the opinion of the court:

Defendant, Ladell Henderson, was found guilty of murder, attempted murder, home invasion and conspiracy to commit murder. Defendant was sentenced to natural life imprisonment for murder, thirty years for attempted murder and seven years for conspiracy to commit murder. Defendant was not sentenced on the conviction for home invasion. On appeal, defendant argues that (1) the trial court's instruction on attempted murder was erroneous in that it allowed the jury to find defendant guilty without finding that he acted with the specific intent to kill; (2) the trial court improperly excluded evidence of the complaining witness' alleged drug addiction; (3) the trial court erroneously denied defendant's motion to suppress his pre-trial statement; (4) the State was improperly permitted to bolster the complainant's testimony; (5) the trial court abused its discretion in sentencing defendant to a term of natural life imprisonment and (6) defendant was improperly convicted and sentenced on both murder and conspiracy to commit murder. We affirm in part and reverse in part.

The testimony introduced by the State at trial establishes that on February 28, 1984, Mona Chavez and her

uncle, Dennis Leonard, were at home watching television. Chavez heard a knock on the door. When Leonard opened the door, defendant and two other men were standing in the doorway. Two of the men grabbed Leonard and threw him to the floor. Defendant then walked to Chavez and said, "You gonna die bitch." Defendant told Leonard that he was going to die, pulled out a gun and fired two shots into the back of Leonard's head. Chavez pleaded for her life with defendant but he told her that if he could not have her then nobody would. Defendant then grabbed her hair, pulled her head to the side and shot her.

Chavez stumbled down the apartment stairs and cried for help. When the police arrived, Chavez informed them that defendant had shot her. Chavez knew defendant from the neighborhood because he had asked her several times to be "his lady." Chavez had also seen defendant four days prior to the shooting because he kicked her back door in to her apartment and took some of her personal possessions.

Assistant State's Attorney Kim Kardas, who interviewed defendant subsequent to defendant's arrest, also testified. Kardas testified that prior to his questions directed to defendant, he informed defendant that he was an assistant State's Attorney. Kardas read defendant his rights and defendant indicated that he understood. According to Kardas, defendant stated that he knew what an assistant State's Attorney was and also knew that Kardas was not his lawyer.

According to defendant's statement, on the evening of the shooting, defendant was informed by someone

named Billy Ray that there was a contract out on Chavez. Billy Ray wanted defendant to take him to Chavez's apartment. Defendant, Billy Ray and another man, "Speedy," went to Chavez's place. Leonard opened the door and told Billy Ray that he thought Chavez's debt of $1500 had been settled. Billy Ray and Speedy took out their guns and told Leonard to lie down on the floor. In response to Chavez's request for help, defendant informed her that it was out of his hands. Billy Ray and Speedy told defendant to leave the apartment. As defendant left the apartment, he heard the shots that were fired.

After Kardas took defendant's statement and defendant began to read it to make any corrections or changes, defendant stopped on the second page when he saw the words "Assistant State's Attorney." Defendant then told Kardas, "I thought you were my lawyer." Kardas testified that defendant then claimed that Kardas stated that he was defendant's lawyer.

Prior to trial, defendant made a motion to suppress this statement. At the hearing, the defense presented witnesses who testified as to defendant's intellectual capabilities. Leonard Unterberger, a psychologist, stated that defendant has a below average I.Q. of 64. He further stated that defendant possesses limited reading abilities. Unterberger's conclusions were based upon diagnostic work performed by the psychological examiners under Unterberger's supervision.

The trial court denied defendant's motion to suppress. Following trial, defendant was found guilty by a jury and sentenced to natural life imprisonment for the

murder, thirty years for attempted murder and seven years for conspiracy. No sentence was imposed for home invasion and the conviction for this charge is not a contention in this appeal.

Defendant first argues that the trial court's instruction on attempted murder was erroneous in that it allowed the jury to find defendant guilty of murder without finding that he acted with the specific intent to kill.

The jury was instructed as follows:

> A person commits the offense of murder when he kills an individual, if, in performing the acts which cause the death, he intends to kill or do great bodily harm to that individual; or he knows that such acts would cause death to that individual; or he knows that such acts create a strong probability of death or great bodily harm to that individual; or he is committing the offense of home invasion.
>
> * * *
>
> A person commits the offense of attempt murder when he, with intent to commit the offense of murder, does any act which constitutes a substantial step toward the commission of the offense of murder.
>
> * * *
>
> The offense attempted need not have been committed. To sustain the charge of attempt, the State must prove the following propositions:
>
> > First, that the defendant, or one for whose conduct he is legally responsible, performed an act which constituted a substantial step toward the commission of the offense of

> murder; and second, that the offender, or one for whose conduct he is legally responsible, did so with intent to commit the offense of murder.

The instruction as given makes specific reference to the "intent to commit the offense of murder." However, relying on *People v. Kraft* (1985), 133 Ill.App.3d 294, 88 Ill.Dec. 546, 478 N.E.2d 1154, defendant argues that this instruction allowed the jury to convict him if they found that he possessed less than the specific intent to commit murder. We disagree.

In *Kraft*, the court held that because attempted murder requires the mental state of intent to kill, the instruction given which "permitted a conviction upon a finding that a defendant acted with knowledge that his action created a strong probability of death even if the jury believed defendant did not intend to kill anyone" was defective. 133 Ill.App.3d 294, 302, 88 Ill.Dec. 546, 552, 478 N.E.2d 1154, 1160.

Kraft however is distinguishable from the case at bar. In Kraft, the defendant was charged only with attempted murder. In the instant case however, defendant was charged with both attempted murder and murder. It would be illogical to say that the court could not give an instruction on murder containing alternate states of mind when defendant was in fact charged with murder and was entitled to an instruction thereon. We therefore find defendant's argument unpersuasive and conclude that the instructions as given did not allow the jury to find defendant guilty of attempted murder without finding that he had the specific intent to kill. Accordingly, the

trial court did not err in giving the instructions to the jury.

Defendant next argues that the trial court improperly excluded evidence of the complaining witness' alleged drug addiction. Defendant asserts that evidence of habitual drug use is a significant fact in evaluating the credibility of a witness. While we agree that a witness' drug addiction at the time that an offense or event occurred is a proper area for cross-examination, the trial court is vested with discretion to determine the admissibility of evidence. Thus, the trial court's determination will not be disturbed on review absent an abuse of that discretion. *People v. Rogers* (1985), 135 Ill.App.3d 608, 624, 90 Ill.Dec. 660, 671, 482 N.E.2d 639, 650.

Here, defendant attempted to establish that the victim had been observed using drugs "on numerous occasions" prior to the night of the crime. On cross-examination, the victim was questioned about her relationship with a defense witness who the defense asserted would testify about the victim's alleged drug use. The victim denied any involvement with this defense witness as well as any drug use. Defendant did not question the victim any further regarding this matter. However, defendant later attempted to introduce evidence of the victim's alleged drug use. Following defendant's offer of proof, the trial court excluded this evidence finding that "the only reason [you're] doing it is to dirty up the witness."

Defendant made no reference or qualification as to when the victim allegedly used drugs or the extent of impairment from the use of any drugs. Thus, we are inclined to agree with the trial court that such evidence

would not shed light on the victim's ability to adequately perceive the events as they occurred on the night of the offense. To the contrary, this evidence would simply "dirty up" the witness in the eyes of the jury. Accordingly, we find that the trial court properly excluded any evidence of the victim's alleged drug addiction.

Defendant also argues that the trial court erred in denying defendant's motion to suppress his pre-trial statement. Defendant presented testimony evincing his impaired intellectual capabilities and his below average I.Q. Based upon this evidence, defendant argues that his statement was not made voluntarily and that he did not knowingly waive his right to counsel.

We initially note that evidence of limited intellectual capacity alone does not indicate that a defendant is incapable of waiving his constitutional rights and making a voluntary confession. *People v. Ellison* (1984), 126 Ill.App.3d 985, 992, 81 Ill.Dec. 222, 226, 466 N.E.2d 1024, 1028. To the contrary, it is only one of the issues to be considered in reviewing the totality of the circumstances under which a confession is made. Moreover, the police are not required to conduct a mental examination of the accused with a view to ascertaining his ability to comprehend his rights as a prerequisite to accepting the accused's voluntary waiver. *People v. Cooper* (1975), 30 Ill.App.3d 326, 332, 332 N.E.2d 453, 458. The particular facts and circumstances of each case as well as the experience, conduct and background of the accused must be considered in determining whether a waiver is knowingly and intelligently made.

In reviewing the totality of circumstances surrounding defendant's statement, we find that a preponderance of the evidence demonstrates that the defendant understood and knowingly waived his constitutional rights. Where as here the record supports a finding that defendant's subpar mentality did not interfere with his ability to comprehend the meaning of a voluntarily made statement or a right to counsel, his statement will not be suppressed.

Defendant next argues that the State was improperly permitted to bolster the victim's in-court testimony with prior consistent out-of-court statements. Defendant objects to the victim's testimony of an identification she made to the police the morning following the incident. Defendant also objects to an investigating police officer's testimony of the identification the victim made at the scene.

In *People v. Rogers* (1980), 81 Ill.2d 571, 44 Ill.Dec. 254, 411 N.E.2d 223, our supreme court recognized that although a witness may not testify as to out-of-court statements made for the purpose of corroborating his in-court testimony, that rule does not apply to statements of identification. 81 Ill.2d, 571, 578, 44 Ill.Dec. 254, 258, 411 N.E.2d 223, 227. The court noted that evidence of out-of-court identifications by both the identifying witness and a third person who saw or heard the identification is admissible for the limited purpose of corroborating the in-court identification. The court stated that such corroboration is justified to rebut the notion that "by the time of trial, the witness' mind has become so conditioned that there is little likelihood that he would not identify the

person in court." 81 Ill.2d 571, 578, 44 Ill.Dec. 254, 258, 411 N.E.2d 223, 227.

Thus, based upon the holding in *Rogers*, we find that the trial court properly permitted the victim as well as the police officer to testify as to the victim's prior identification of defendant.

Defendant next argues that the trial court abused its discretion in sentencing defendant to a term of natural life imprisonment. We disagree.

The imposition of a sentence is a matter of judicial discretion, and absent an abuse of that discretion, the trial court's determination will not be disturbed on appeal. *People v. Lipa* (1982), 109 Ill.App.3d 610, 614, 65 Ill.Dec. 207, 210, 440 N.E.2d 1062, 1065. Moreover, a trial court's determination of a sentence is entitled to great deference and weight on appeal, because it is in a better position than a reviewing court to determine the proper sentence. The trial court has the opportunity to consider the subjective circumstances in each particular case such as the defendant's (1) demeanor and character; (2) mentality; (3) abnormal or subnormal tendencies and (4) natural inclination or aversion to commit crime. *People v. Reese* (1984), 121 Ill.App.3d 977, 989, 77 Ill.Dec. 390, 398, 460 N.E.2d 446, 454.

In the case at bar, the State, in aggravation, presented evidence that defendant had been adjudicated a delinquent three years prior for attempted murder and aggravated battery. The State also introduced evidence that defendant was on probation for burglary at the time of this offense. In light of the nature of this crime and

defendant's background, we find that the trial court did not abuse its discretion in sentencing defendant.

Defendant next argues that he was improperly convicted and sentenced on both murder and conspiracy to commit murder because there is a statutory prohibition against convictions for both the inchoate and the principal offense. The State concedes that under Section 8-5 of the Criminal Code "no person shall be convicted of both the inchoate and the principal offense." Ill.Rev.Stat.1985, ch. 38, par. 8-5. Accordingly, we vacate defendant's conviction for conspiracy to commit murder, and affirm defendant's conviction and sentence for attempted murder and murder.

AFFIRMED IN PART; VACATED IN PART.

McNAMARA and FREEMAN, JJ., concur.

STATE CUSTODY

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed

to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination

by the State court shall be admissible in the Federal court proceeding.

ANTITERRORISM ACT OF 1996

P.L. 104-132 Sec. 104

SEC. 104. SECTION 2254 AMENDMENTS.

Section 2254 of title 28, United States Code, is amended –

(1) by amending subsection (b) to read as follows:

"(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

"(A) the applicant has exhausted the remedies available in the courts of the State; or

"(B)(i) there is an absence of available State corrective process; or

"(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

"(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

"(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.";

(2) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively;

(3) by inserting after subsection (c) the following new subsection:

"(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

"(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.";

(4) by amending subsection (e), as redesignated by paragraph (2), to read as follows:

"(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to

be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

"(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

"(A) the claim relies on –

"(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

"(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."; and

(5) by adding at the end the following new subsections:

"(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

"(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.".